United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

4274 76-~~7424~~

ORIGINAL

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ORTIZ FUNERAL HOME CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
ORTIZ FUNERAL HOME CORP.

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I N D E X

AUTHORITIES CITED

Cases:

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STATEMENT OF ISSUE PRESENTED

1. Did the parties reach an agreement on April 28th, 1975?

2. Is testimony of the General Counsel's witnesses creditable so that the determination could be supported by the record?

3. Were the rulings by the Administrative Law Judge so prejudicial and in error in not allowing counsel for Respondent to inquire into material areas?

STATEMENT OF THE FACTS

On March 21, 1975, Ortiz Funeral Home Corp., ("Employer") entered into a settlement agreement in which the Employer agreed to recognize and bargain with the Union. On April 10, 1975, the Employer by its president, Michael Ortiz, met with the Union to commence bargaining (A. 21, 48, 114) 1/.

The Employer was advised that it would receive a collective bargaining agreement ("contract") similar to that of the Ponce Funeral Home, a competitor of the Employer whose employees are represented by the Union (A. 125). On April 28, 1975 the parties continued their negotiation and the Employer raised objections (A. 117). The principal who negotiated at the first two negotiating sessions for Local 1034 ("Union"), Michael Fleischer ("Fleischer"), testified that on April 28, 1975 the Employer was given a collective bargaining agreement marked GC 3 and the Employer had stated to Fleischer that he could not sign the agreement but that the Employer stated that he would have to take the contract "in respect to his father and show his father just what it is all about.". (A. 23-26).

1/ Reference to appendix pages are referred o as "A.". Reference to General Counsel and Respondent Employer's exhibits are prefixed respectively as, "GC", and "R".

The Employer denied receipt of a contract on April 28, 1975 but admitted that it received a proposed contract in the mail with a covering letter (GC 5). The General Counsel introduced no further evidence of collective bargaining negoiations between the parties.

After receipt of the proposed contract in May, 1975 the Employer through its principal officer, Michael Ortiz called the Union and spoke to Bernard Adelstein ("Bernard"), the president of the Union. The Employer voiced objections to the contract and a meeting was set up for May 27, 1975 (A. 118). At the May 27, 1975 meeting, objections were raised by the Employer, which included the lack of names of the employees in appendix B of GC 3, holidays, severance pay and other matters (A. 118). Bernard then requested an opportunity to examine the books of the Employer to ascertain the names of the employees in the Union. Fleischer came to the place of business of the Employer and examined its payroll book for the purpose of ascertaining the names of the employees to be included in Appendix B of GC 3 (A. 119).

After Fleischer examined the books of the Employer, another collective bargaining session of held at the Union on June 3, 1975 with Bernard (A. 119). At the meeting Bernard told the Employer that it was Bernard's belief that every employee in the shop was represented in the Union (A. 121). The Employer advised Bernard that the settlement agreement

only covered a select unit. Bernard told the Employer that the Union represented all of the work force of the Employer. Bernard told the Employer that it was his impression that the settlement covered the whole shop and called for a copy of the settlement agreement. After examining the settlement agreement Bernard called the lawyer for the Union, Richard A. Weinman into the office with the Employer, and told Mr. Weinman that he thought the settlement agreement covered the whole work force. The Employer was asked to leave the room and after discussion between Bernard and Mr. Weinman, the Employer was called back to the room and told to sign the agreement. The Employer objected stating that he could not sign since he had no way of knowing what his costs would be and who was included in the unit. The Employer was told by Bernard that the Union would "go for broke" and would "strike tomorrow", uless the contract was signed that day. The Employer was taken aback, but the parties then agreed to meet July 10, 1975 to discuss a resolution of the remaining issues (A. 120-123).

The Union elected not to continue the negotiations and on July 7, 1975 filed the charge and in the charge alleged that the unit covered "21 employees", the total work force of the Employer (GC 1). The Employer called the Board upon receipt of the charge spoke to the Board agent, Frank H. McCulloch, who advised the Employer to go to the next nego-

tiating of July 10, 1975 (A. 123).

The Employer went to the July 10, 1975 meeting and was then again told by the Union to sign the contract and any issues not resolved could be resolved through arbitration (A. 124). The Employer told Bernard that he would not go to arbitration but wanted a similar contract as was given to Ponce Funeral Home, its competitor (A. 124-130, R 1). No agreement was reached and the Union thereafter brought an arbitration proceeding in the New York State Supreme Court, which arbitration proceeding was dismissed and the Court in its decision stated that there were material differences between the Union and the Employer and denied the Union's demand for arbitration to enforce the proposed contract (R 4 for identification).

The Employer offered to open its books and records to the Union and to the NLRB and offered to allow the NLRB to determine the job classification of each employee and to determine which of its employees were in the unit called for in the settlement agreement. This was incorporated in a stipulation by counsel for the parties (A. 16).

POINT I

NO AGREEMENT WAS REACHED

The Union refused to bargain in good faith when it insisted that the Employer sign a contract where there was no agreement reached on a material element. During the negotiations between the Employer and Bernard in May,

1975, the Union shifted from its position where the unit would be comprised of a limitted number of employees to one where it included the entire work force of the Employer, even though there were specifically excluded categories in the settlement agreement.

In view of the claim by the Union that it represented every employee, the Employer was faced with the most material issue as to how the settlement agreement could be applied to the work force which did not have a clearly defined job description. The settlement agreement excluded "licensed embalmers, undertakers, drivers, managers, office clerical employees, bookkeepers, guards, watchmen and supervisors" (A. 153, GC 2(a)). The work of the excluded employees very often overlapped into the job classification of those in cluded in the unit. It could be argued that office clerical, bookkeepers, guards and watchmen, who during certain periods spoke to customers, directed them to particular rooms or to people in the funeral home could be classified as "floor people, receptionist, interpreters or attendants", all who were covered in the unit recognized by the Employer. The Union when it made a claim for all 21 employees, the total work force of the Employer, set upon a course of action to require the Employer to include in the unit, employees who the Employer never intended and specifically excluded from the settlement. The position of the Union that twenty-one (21) employees were included in the unit was not factual or logical and the refusal

of the Union to indicate who of the employees it claimed was in the unit placed the Employer in an untenable position.

The subject of wages and conditions is a complusory bargaining subject. The refusal of Union to indicate who would be entitled to wage increases set forth in the proposed contract led to an impasse that was not unlawful. The proposed contract called for mandatory wage increases and benefits. It was essential for the Employer to be aware of its cost so that the bargaining with the Union would have a relationship to economic reality.

The insistence of the Union that the Employer sign the contract and then arbitrate any issues was a condition the Employer could not and was not required to accede to.

The proposed contract itself was not complete. It is hornbook law that a contract must be complete. The proposed contract given to the Employer was incomplete. (GC 3). There was no list of the names of the employees covered as was called for in Appendix B, there was no meeting of the minds or mutual assent of the parties as to what holidays were days off, together with other issues that were unresolved. The Employer not having any way to gauge its costs, not knowing what days the Union would designate as holidays so as to cause the nine funeral establishments of the Employer to close, make the terms so onerous as to make the proposed contract illusory and beyond the

intent of the negotiations between the parties.

The position of the Employer was, and is not arbitrary or contrary to law. In the arbitration proceeding commenced by the Union, the Supreme Court of the State of New York by Justice Helman stated:

> "The issues raised by petitioner as to the number of men covered by the agreement is a material one, and while the Union may challenge the Employer's good faith in refusing to sign a contract, the fact is that no binding agreement has been made as to each of the material terms of the agreement". (A. 214, R 4). (Emphasis supplied)

The papers submitted by the Union in the arbitration proceeding in the Supreme Court of the State of New York set forth the negotiations between Bernard and the Employer in May and June, 1975. This contradicts the position of the Board that negotiations concluded on April 28, 1975. It is clear from the decision of Judge Helman that on the basis of the papers before the Court it was obvious that there were material issues that the parties had not agreed upon. This determination is res judicata upon the Union and it should be collaterally estopped from denying the facts and issues before the Supreme Court of the State of New York, as no appeal was taken, and is an opinion of which this Court should take judicial notice.

The witnesses produced by the General Counsel testified that they were not aware of negotiations after April, 1975. It is inconceivable that none of the principals of the

Union was aware of the negotiations that took place on May 27th, June 3rd, and July 10th, 1975 between the Employer and Bernard. This stonewalling on the part of the Union as to the areas covered and discussed between the parties in May, June and July, 1975, in particular those areas that had not been agreed upon, should not be condoned. The failure of the Union or the General Counsel to call as a witness Bernard, its principal officer and actor in these negotiations, gives rise to an inference, adverse to the Union, that Bernard would not contradict the testimony of the Employer concerning his conduct and statements, including admissions to the Employer. See UAW v. N.L.R.B. (Gyrodyne), 459 F.2d, 1336 (C.A.D.C., 1972).

The Employer had advised the Union that its business had slowed down (A. 143). The Employer knew that Ponce Funeral Home, its competitor, had an agreement with the Union in which Ponce could determine increases in wage rates to its employees and benefits since Ponce had the names of the employees listed on the contract. The Union after ascertaining that they did not have the whole work force refused to tell the Employer how many of the employees would be entitled to wage increases and benefits. The Union knew that the Employer had nine funeral homes each with a different location. Each funeral home had to have a licensed embalmer, chauffeurs were required, undertakers, office clerical employees, bookeepers, guards, watchmen and supervisors. All of the aforementioned were excluded

from the unit pursuant to the settlement agreement. The Employer had twenty-one (21) employees and four (4) principals. How could the Union claim twenty-one (21) people in the unit when at a minimum nine licensed embalmers were excluded? If the Employer was required to pay wage increases after arbitration to the licensed embalmers and other in the excluded coverage, then the Employer would be at a disadvantage with its competitors such as Ponce. The Employer's refusal to sign the contract for wage increases that could cause the Employer to lose its competitive position with Ponce was lawful. See Borg-Warner Corp. (Calumet Steel Div.) (1940) 23 NLRB 114; Youlin, Samuel, (1940) 22 NLRB 879; Aronson Printing Co., (1939) 13 NLRB 799.

When Bernard realized the limited size of the unit and then refused to even discuss questions raised by the Employer and insisted that the Employer sign the incomplete proposed contract, this refusal consistuted bad faith bargaining. The Union's demand that the Employer arbitrate for excluded portions of the unit did not constitute a failure of the Employer to bargain collectively within the meaning of Section 8(a) (5). See Stark Bros. Nurseries and Orchards Corp., (1942) 40 NLRB 1243.

The Employer was at all times prepared and did open its books to the Union. The Employer never refused to furnish information to the Union but the Union refused to furnish information to the Employer. The Union must have been aware of the employees that were in the unit. In any event the Union knew which of the employees were ex-

cluded, such as the licensed embalmers. By refusing to admit that any employee was excluded and by indicating to the Employer that it represented all of the work force, the Union recognized and knew that this would lead to an impasse. The Union elected to "go for broke". The insistence by the Union that the Employer sign the proposed agreement and then arbitrate the unit and other conditions as a sine qua non constituted an unlawful refusal to bargain on the part of the Union, rather than an unlawful act of the Employer. See Longshoremen v. N.L.R.B., 297 F.2d 681, Penello v. Int'l Union, U.M.W. 83 F.Supp. 8935. Just as an Employer must furnish information, conversly the Union is under this same obligation when it is necessary for bargaining purposes. Machinists District 10, Tool & Die Makers Lodge 78 (Square D.Co.) 224 NLRB No.(18).

The Employer was prepared to avail itself of the Board's processes to determine which of the employees was covered in the unit. The Union's insistence that the Employer sign an agreement without material portions of the agreement being concluded, did not constitute a violation of the bargaining requirements of the Employer. General Counsel stipulated that the Employer was prepared to recognize in the unit any of the employees found by an agent of the Board to be in the unit, and the Employer agreed to be bound by this finding (A. 16-17). The Union would not agree to any procedure where the amount of the employees who were in the unit would be

determined prior to the proposed agreement being signed. The good faith offer by the Employer was consistant with the good faith bargaining required of the Employer, and the insistence by the Union that the Employer sign the proposed agreement without all the terms being set forth, was a condition the Employer could not, and was not required by the Act to concede. See Bethlehem Transportation Corp., (1945) 61 NLRB 1110; N.L.R.B. v. Jackson Press Inc., 201 F.2d 541; Mike Persia Chevrolet Co., (1953) 107 NLRB 377; N.L.R.B. v. Hanuaford Bros. Co., 261 F.2d 638; Bonwit Teller Inc., (1969) 170 NLRB (No. 55); Sportswear Industries Inc. (1964) 147 NLRB 758; H. Wenzel tent and Duck Co., (1952) 101 NLRB 217.

The insistence by the Union that the Employer sign a contract without the names of the employees in the unit and arbitrate for a unit wider than the settlement agreement, is unlawful. If the Employer during the contract negotiations agreed and did bargain for a broader unit, or agreed to arbitrate this issue, this bargaining could have worked to open the door to negotiations for a broader unit. See Longshoremen's Assoc. (ILA) N.Y. Shipping Assn. (1961) 134 NLRB 1279; Compton v. Carpenters, 220 F.Sup. 280; Longshoremen v. N.L.R.B., 297 F.2d 681.

POINT II

CREDITING COMPLETELY THE TESTIMONY OF THE GENERAL COUNSEL'S WITNESSES AND COMPLETELY DISCREDITING THE TESTIMONY OF THE EMPLOYER WAS ERROR AND LED TO AN ERRONEOUS DETERMINATION.

The crediting of the testimony of Fleischer that the Employer had been given and agreed to a collective bargaining agreement on April 28, 1975 and that the Employer would sign the proposed agreement after showing it to his father, was not credible. The witness testified that the Employer stated at the April 28, 1975 meeting that he would sign the agreement after showing it to his father and this was the last negotiation, is completely untrue (A. 29, 7072). This testimony is completely untrue as the agreement GC 3 was sent to the Employer on ~~the~~ May 1, 1975 as evidenced by the covering letter marked GC 5 (A. 188). How could the Employer have agreed to GC 3 on April 28, 1975, the alleged last negotiating session when the Employer did not receive GC 3 until after May 1st, 1975, the date it was sent by mail? The testimony of Fleischer credited by the Board that the Employer had agreed to the contract but wished to show the contract to his father at the April 28, 1975 meeting is extraordinary since there was no contract given to the Employer to show to his father on that date, and was further disputed by the testimony of General Counsel's witness Domingo Vargas (A. 72).

Not crediting the Employer's statement that he asked

for the names of the employees in the unit during the negotiations was contradicted by Mr. Vargas' testimony when General Counsel asked Vargas whether the Employer talked about names of employees and Mr. Vargas answered that the Employer did (A. 73).

In order to substantiate the position that the negotiations ended April 28, 1975, the General Counsel offered testimony of Domingo Vargas, an employee and member of the negotiating committee. Mr. Vargas testimony was replete with conclusions, assumptions, and statements that he could not recall, and his conclusion that the Employer agreed to the proposed contract, which conclusion was credited by the Board, was predicated on the fact that this is what he was told by "the Union official". (A. 58). The statement of the Union officials cannot be regarded as a position of the Employer and the Employer clearly is not bound by the Union's statement to Mr. Vargas.

The failure of the Board to consider the affidavit of Bernard listing the three negotiating sessions of May 29, June 3rd, and July 10th, 1975 led to a statement in the petitioner's brief that is not factual.

> "Moreover, even assuming the listing of employees in the unit was a valid concern, the Company plainly waited too long to raise the issue. The Board discredited Ortiz' assertion that this issue was raised at the April 28 meeting, and there is no basis for overruling that critical credibility ruling. The Company cannot lay back for three months and then inject this issue in order to avoid signing the agreement." (Pet. brief P. 12-13)

The Employer immediately raised the issues after receiving the proposed contract with a telephone call to the Union and reiterated its concern at the May 27, June 3 and July 10th, 1975 meetings. The Employer did not lay back for three months but moved immediately.

When Mr. Fleischer was questioned about the Ponce contract to show that the Ponce agreement had a list of employees covered by the unit, and the proposed contract to the Employer did not, Mr. Fleischer tried to explain this inconsistency away by stating that the reason the Ponce collective bargaining agreement had a list of employees names was that the Ponce collective bargaining agreement included "embalmers and chauffers". This was patently false as an examination of the Ponce agreement will show (R 1). The Ponce agreement covered the same unit as the proposed agreement given to the Employer and did not include embalmers and chauffers (GC 3). When Mr. Fleischer was asked to examine and identify the Ponce agreement, the witness tried to hide behind the fact that the Ponce agreement shown to him was a photostat and therefore "not our paper". This blatant attempt by the witness to avoid the irrefutable fact that the Ponce agreement contained a list of employees exactly similar to that of Schedule B in the proposed contract to the Employer by stating that the appendix was included in this contract by a secretary who "just typed this on her own, the last page this appendix B", proves the witness tried to hide the obvious and

was not credible (A. 45). This appendix was in the Ponce agreement and was a normal part of the contract.

When Mr. Fleischer was questioned about meetings with the Employer in May, 1975 he stated that the reason for the meeting was to deliver a copy of the proposed agreement that was stolen from the Employer's car. He testified that he delivered the copy of the proposed agreement because Mr. Ortiz "told me his car was stolen or something and he lost the contract that was originally in his car. I brought him another set of these contracts" (A. 30). On cross examination the witness changed his story and stated that in May, Bernard Adelstein told him to bring "two more contracts down to Mr. Ortiz, that his were lost." (A. 38). The fact is that Mr. Ortiz's car was stolen in June, 1975 and this was reported to the 43rd Precinct in the Bronx (A. 142).

The testimony of Martin Adelstein is similarly afflicted with a professed lack of knowledge on the part of the witness of the meetings of the Employer with Bernard. (A. 98-99). Martin Adelstein did recall the discussion as to the amount of people in the unit and admitted he received the list of names of employees who the Employer believed were in the unit and should have been set forth in the proposed contract (A. 91). Martin Adelstein also remembers there were discussions as to the rules and regulations that were not resolved (A. 87). The Union's request that the Employer supply the names that the Employer believed were in the unit clearly indicates that

this issue was being negotiated by the parties and once the Union had entered into these negotiations, the Employer was within his legal right to pursue this area.

However, Martin Adelstein had a convenient loss of memory when he was questioned concerning the two negotiating sessions that took place with Bernard on May 27th, and June 3rd, 1975. Martin Adelstein was present at these meetings but in answer to questions as to whether he was present he answered "I don't recall" (A.98-99). Either the witness was there or he was not. The two meetings were common knowledge. The meetings were discussed by Bernard in an affidavit submitted to the Supreme Court of the State of New York in which Martin Adelstein also submitted his affidavit, yet this witness testified that he was not familar with the papers (A.96). By so testifying the witness could then hide behind his lack of memory and not allow questions to show that there were material differences between the parties as evidenced by the affidavit of Bernard. The testimony of Martin Adelstein was evasive and not candid or credible.

The Union requested the Employer allow its books to be examined and that the Employer supply the names of the employees that the Employer believed were in the unit. The Union and the Employer were in negotiations on the size of the unit and once the Union had entered into negotiations to broaden the unit, the Employer was within his legal rights to pursue this area. In the case of

Longshoremen's Assoc. (ILA) (New York Shipping Assn.), supra, the Board stated:

> "To the contrary it appears to the undersigned that once NYSA opened the door for bargaining on a broader unit basis the unit to be covered in the contract itself became a bargainable matter about which each side was then required to bargain in good faith and each side was then free to use legitimate economic power to obtain the unit it sought."

The decision on page 3, note 6, line 49, states that Martin Adelstein corroborated the testimony of Mr. Vargas that after the negotiations in April, 1975 the parties were in agreement, is contradicted by the record.

Mr. Vargas' testimony that the Employer agreed to the proposed contract was predicated on what he was told by the "the Union official" (A. 58). The record clearly indicates that not only was this alleged agreement in April, 1975 not corroborated by Martin Adelstein but Mr. Adelstein knew nothing material, as is evident from the answers to the following question from General Counsel to Mr. Adelstein about the April negotiations:

> "Q. During the time you were there what was discussed?
>
> A. I really don't recall any material discussions from that meeting. I observed it. (A. 73 L. 5-7).

The testimony of Martin Adelstein never corroborated the testimony of Mr. Vargas that an alleged agreement was reached during April, 1975.

The Board's decision did not attempt to explain

the inconsistencies in the testimony. The decision did not discuss what was negotiated or discussed during the May, June and July negotiating meetings between the parties but simply ignored the negotiating meetings. The decision did not set forth the reason the testimony of the Employer was not credited.

POINT III

THE RULINGS BY THE ADMINISTRATIVE LAW JUDGE WAS SO PREJUDICIAL THAT THE EMPLOYER WAS NOT GIVEN AN OPPORTUNITY TO PROPERLY DEFEND.

Examples of prejudicial error in the record are contained on pages 36 to 39 of the appendix, where counsel for the Employer attempted to impeach the credibility of the witness but was stopped; the Administrative Law Judge would not let the Ponce contract into evidence yet the Administrative Law Judge referred to the Ponce contract in the decision on Page 5 footnote 13. Counsel for the Employer should have been allowed an opportunity to examine the witness concerning this contract both on credibility and as to what the wage schedule was and how it was different from the contract offered to the Employer.

Counsel for the Employer attempted to introduce into evidence affidavits submitted in the Supreme Court, New York County action, were the witness Martin Adelstein submitted an affidavit. The action and the Court papers were between the same parties and the Court papers referred to negotiations after April, 1975 between the parties during May and June, 1975. The Employer was entitled to refer to these

papers as they were filed Court documents and judicial notice should have been taken of them. The Employer should have been allowed to refer to the contents of the Court papers to impeach the credibility of the witness who submitted an affidavit that were part of these papers (A. 135-136). The admissions as to negotiating sessions in May, June and July, 1975 were material and the failure of the Administrative Law Judge to admit the documents was error.

When counsel for the Employer attempted to show that the number of employees covered by an agreement was material in the negotiating process, counsel was abmonished by the Administrative Law Judge who stated:

> "JUDGE LIPTON: Sustained.
>
> Now, you have had rulings on this and I am cautioning you. if you keep wasting the court's time, I am going to have to take some measures." (A. 111)

CONCLUSION

THE COMPLAINT SHOULD BE DISMISSED AND THE PARTIES SHOULD BE ALLOWED TO COMPLETE THEIR NEGOTIATIONS

Dated: New York, New York
March 30, 1977

Respectfully submitted,

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C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7424

NATIONAL LABOR RELATIONS BOARD,

against

Petitioner,

ORTIZ FUNERAL HOME CORP.,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th Street, New York, N.Y. 10024.

That on April 1, *1977 deponent served the annexed*
BRIEF FOR ORTIZ FUNERAL HOME CORP.
on Robert G. Sewell, Esq., National Labor Relations Board, Washington, D.C. 20570
attorney(s) for Petitioner
in this action at National Labor Relations Board, Washington, D.C. 20570
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

2 ies

Sworn to before me this 1st day of April, 1977.

August De Fonse

The name signed must be printed beneath

AUGUST DE FONSE

George Cohen

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1979

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